



# United States Department of the Interior

BUREAU OF LAND MANAGEMENT  
ALASKA STATE OFFICE  
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ANCHORAGE, ALASKA 99513-7599

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SEP 9 2003

Mr. Harold Brown  
President and Chairman  
Tanana Chiefs Conference  
Chief Peter John Tribal Building  
122 First Avenue, Suite 600  
Fairbanks, Alaska 99701-4897

Dear Mr. Brown:

This is in reply to your letter of August 6, 2003 in which you outlined a number of concerns about the State's filing of an application for a recordable disclaimer of interests in the beds of the Black River Slough, Black River and its tributaries, Salmon Fork, Grayling Fork, and Bull Creek, and all interconnecting sloughs. Before I address these concerns, let me make a few introductory remarks about title navigability law and how the BLM has administered this law in Alaska.

By the Submerged Lands Act of 1953, title to unreserved lands underlying navigable waters passed from the United States to the States at the time of statehood. This Act was expressly applied to Alaska by Section 6(m) of the Alaska Statehood Act. Thus, when Alaska joined the Union on January 3, 1959, ownership of the lands underlying inland navigable waters automatically passed to the State.

At the time of statehood, no one knew with certainty, beyond a few obvious cases, what was navigable or non-navigable. Outside of certain federal land reserves and withdrawals, navigability is a question of fact. Was the river or stream used for travel, trade, and commerce at the time of statehood, and, if not, was it susceptible for such use at the time of statehood? The BLM is the most experienced among Interior Department agencies in researching and determining the navigability of Alaska's inland water bodies. Much of this experience has been gained from determining the navigability of water bodies on lands subject to conveyance under the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or the Native Allotment Act. Since the mid 1970s, well over 100 million acres of land in Alaska have been reviewed for navigable and non-navigable waters. This has been done for all Native villages, including Chalkyitsik. If it finds that the waters are navigable, the Bureau excludes the submerged lands from conveyances to

the Native corporations and excludes the submerged land acreage from charges against the corporations' acreage entitlements. Similarly, the submerged lands are excluded from conveyances under the Native Allotment Act.

But what about water bodies on lands that will not be conveyed to the State, Native corporations, or Native individuals? Certainly there is a need to know whether submerged lands in these areas are owned by the United States or the State. On January 6, 2003, the Bureau published a final rule amending its disclaimer of interest regulations (68 Fed. Reg. 494; 43 CFR part 1864). The disclaimers of interest rule creates an administrative process for the State to remove clouds on its title to lands underlying navigable waterways. In Alaska, the State has long wanted a legal document affirming its title to these submerged lands. Ordinarily, this is accomplished through real property quiet title actions in the Federal courts. Court action, however, has proved an unsatisfactory method because of the large number of potentially navigable waterways that cross Federal public lands and the high cost of litigation. The State has also argued that it is presented with few opportunities to initiate a quiet title action because Federal agencies rarely take an action that adversely affects its claim to submerged lands. Since statehood, the Federal courts have quieted title to a dozen waterways—this in a state that has hundreds of potentially navigable waterways.

On February 14, 2003, the State of Alaska submitted its first application for a recordable disclaimer of interest for lands underlying navigable waters, specifically, the Black River and certain tributaries. On May 8, 2003, the Bureau published a Notice of the State's application in the *Federal Register*. As you know, most of the river and its tributaries, excepting the upper reaches of the Salmon Fork, Grayling Fork, and Bull Creek, are located in the Yukon Flats National Wildlife Refuge. Portions of the Black River are also located in areas conveyed to Chalkyitsik, Inc., or Doyon, Limited, and portions of Grayling Fork and Bull Creek are located in areas conveyed to Doyon, Limited.

More than twenty years ago, the BLM published a finding that these waterways were navigable. During litigation before the Alaska Native Claims Appeal Board in 1980 over the navigability of Grayling Fork and Bull Creek, the Bureau surveyed the historical record and finally determined that the Black River from the Porcupine River to Wood River, Salmon Fork to the International Boundary, Grayling Fork to the International Boundary, and Bull Creek to Section 5, T. 13 N., R. 31 E., Fairbanks Meridian, were navigable. On July 24, 1981, the ANCAB determined that Grayling Fork and Bull Creek were navigable in three townships (Tps. 15 and 16 N., R. 28 E., and T. 16 N., R. 27 E., FM). Subsequently, the BLM incorporated its determination that the Black River was navigable in several Decisions to convey lands at and in the vicinity of Chalkyitsik to Doyon, Ltd., and the Chalkyitsik Native Corporation. The corporations did not protest the determination that the river was navigable. Six townships of land (excluding Black River submerged lands) were conveyed to Doyon, Limited, by Interim Conveyance (IC) Nos. 575 (1982) and 1079 (1985) and two and a half townships (excluding Black River submerged lands) to Chalkyitsik Native Corporation by IC No. 1104 (1985).

In addition, the BLM has issued certificates to numerous Native allotments along the Black River, Grayling Fork, and the lower reaches of Bull Creek. In all these cases, the Bureau meandered and segregated the lands underlying these waters from public lands and then conveyed the uplands to the Native allottees.

Now, in the present application for a recordable disclaimer, the State asks whether the United States has an interest in the land underlying these waterways. The State claims these lands under title navigability law. The burden of proof is upon the State. Upon receipt of the State's application, the Bureau and other interested Federal agencies (in this case, the Fish and Wildlife Service) review the State's evidence and decide whether, considering the preponderance of evidence, the waterways meet the legal standards of navigability. If the waters are navigable, there is no Federal interest in the submerged lands, title to the lands having vested in the State in 1959. If the waters are not navigable, the riparian landowner holds title to the center of the river or stream.

At this point, let me address your questions and statements. Generally, I will address them in the order that they are presented.

#### Request for An Extension to Submit Comments

You asked that the Bureau postpone its determination to issue a disclaimer for another ninety days because the public comment period occurred at a time when local residents were busily engaged in the short salmon fishing season and thus not available to provide comments for submission. Moreover, you wanted more time to study the recordable disclaimer procedure.

I appreciate your concerns about the timing of this particular public notice. However, we do not believe anything would be gained by extending the public comment period by another ninety days. The State has the burden of proof that a water body is navigable. The BLM and, in this case, the Fish and Wildlife Service, the two Federal agencies managing lands along the Black River and its tributaries, must determine whether the State is correct in its assertion that the water bodies under application are navigable. Where the State has presented clear evidence that river reaches are navigable, the BLM will, in all probability, issue a recordable disclaimer of interest for those reaches. Where the evidence is not clear, the BLM will either reject those portions of the application or suspend those portions until the State submits additional relevant information. In that event, there is no question in my mind that local residents will be a primary source of information.

#### Request for Public Meeting

You stated that neither the State nor the Bureau consulted with the Tribal governments or held public meetings. And, you asked, "Why weren't local residents interviewed about the historical question of navigability?"

First, let me emphasize our belief that local knowledge is critical in developing an understanding of the physical character and history of use of local rivers, streams, and lakes. Oftentimes, local residents are the only sources of information about these water bodies. We have never had (and do not have) any intention of ignoring local knowledge. On the contrary, we believe that this knowledge is absolutely essential.

As a matter of fact, we have reviewed the statements of many local residents about boating on the Black River and its tributaries, and some of their statements will become the basis of our decisions to approve and not approve different parts of the State's application. You may recall that in the late 1990's the State filed a lawsuit in Federal court to quiet title to the beds of the Black River and the nearby Kandik and Nation Rivers. In preparation for this litigation, the Fish and Wildlife Service collected a great deal of information from residents of Chalkyitsik and Fort Yukon about the history of the Black River. The Service opened its records to the Bureau's researchers so that they could review this information. In addition, we found and reviewed local residents' statements about the navigability of the river in various BLM casefiles—Doyon, Ltd., and Chalkyitsik Native Corporation selection and easement files, Native allotment files, and so on. Of course, we also reviewed such publications as Richard K. Nelson's *Hunters of the Northern Forest*.

I need to point out that we are not required by the regulations to hold a public meeting. Public meetings are certainly one means to obtain navigability information. However, it has rarely been used by the Bureau in navigability research. We have found that face-to-face and telephone interviews are usually the most effective means in collecting specific factual information.

The State has the burden of proof that a waterway is navigable. It is possible that the State will undertake additional research on the Upper Black, Grayling Fork, and Bull Creek. If so, the State would probably contact the Tribal governments and local residents for assistance in collecting information. Documentary research, streams surveys, and hydrological studies are other tools that have been used to collect navigability information.

#### Impacts on Cultural Resources, Wildlife Management Agreements, State Management Practices, and "Public Access Easements"

You asked about the potential impacts that issuance of a recordable disclaimer would have on cultural resources, wildlife management agreements, State management practices, and "public access easements."

Insofar as BLM lands are concerned, I do not foresee any significant impacts. Since 1980 BLM has considered the water bodies under application as navigable and, accordingly, has treated the submerged lands as State lands (since 1959). However, the Bureau is not bound by these determinations. If, in light of new information, it is found that, say, the upper reaches of the streams are not navigable where they cross BLM lands, the BLM will manage the submerged lands as Federal lands—not State lands. It is to be noted, too,

that in certain reaches the lands have long been selected by the State under the Statehood Act. In any case, regardless of a disclaimer, Federal agencies would not be relieved of their responsibilities under the National Historic Preservation Act. Neither would the State.

I do not believe that “public access easements” would be any more of an issue than they are now. The BLM has consistently held that the Black River is navigable in those areas selected under the Alaska Native Claims Settlement Act. This fact was taken into account in the easement identification process.

You mentioned “a moose management cooperative agreement in the area.” Presumably this is the Salmon Fork area. If a recordable disclaimer for this river were issued, the Bureau would in effect be confirming that title to the bed of the navigable waterway vested in the State at the time of statehood. This would add a measure of certainty to submerged land title that did not exist before. In my view, this would benefit Federal and State wildlife managers because they would know with certainty the status of the submerged lands, and thus the extent of their mutual jurisdictions. Nevertheless, I do not foresee an adverse impact because the disclaimer, if issued, would be consistent with the Bureau’s position on the status of the submerged lands since 1980. I am not familiar enough with the operations of the Fish and Wildlife Service to speak authoritatively on what impacts a recordable disclaimer would have on Service programs or the Yukon Flats National Wildlife Refuge. I recommend that you consult with the Service.

#### Impacts on Native Allotments

You asked if, and how, Native allotments would be impacted by issuance of a recordable disclaimer. You mentioned trespass incidents, riparian rights, and nonnavigable waters on the allotments as specific concerns.

A recordable disclaimer of interest would have no impact on Native allotments. Under the regulation 43 CFR 1864.1-3 (b)(2), the Bureau will not approve an application that “pertains to trust or restricted Indian lands.” Native allotments are included in this category of lands. Therefore, the disclaimer, if issued, would not involve any changes in the principles of accretion, avulsion and erosion or the incidence of trespassing on restricted Natives lands.

#### Federal Navigability Determination Criteria

You asked what criteria the BLM will use in assessing the navigability of water bodies—the State’s criteria or its own? The BLM relies upon Federal administrative and case law and the advice of Interior Department’s Solicitor’s Office. The classic definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Among the most important Federal and administrative court decisions pertaining to Alaska are: *Alaska v. United States*, 754 F.2d 851 (9<sup>th</sup> Cir. 1989), *cert. denied*, 474 U.S. 968 (1985) (Slopbucket Lake); *Alaska v. Ahtna, Inc.* 891 F.2d 1401 (9<sup>th</sup> Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) (Gulkana River); *Alaska v. United States*, 201 F.3<sup>rd</sup> 1154 (9<sup>th</sup> Cir. 2000)

(Kandik, Nation and Black Rivers); and *Appeal of Doyon, Limited*, 4 ANCSA 50 (December 14, 1979) (Kandik and Nation Rivers). Pertinent Office of the Solicitor's opinions include Associate Solicitor Hugh Garner's memo of March 16, 1976 ("Title to submerged lands for purposes of administering ANCSA) and Regional Solicitor John Allen's memo of February 25, 1980 ("Kandik, Nation Decision on Navigability"). This information is available on our website ([www.ak.blm.gov/ak930/realty](http://www.ak.blm.gov/ak930/realty)).

You also asked whether the BLM had "conducted its own factual investigation to confirm the navigability of the waterways covered by the proposed rule?" The short answer is yes. In making its application, the State relied upon BLM's determinations of 1980 and a related historical report. Knowing that new information about historical uses of the Upper Black and its tributaries had since come to light, we subjected the report to a critical review and collected and analyzed the new information. This may become the usual procedure. Each river, stream, or lake will be judged solely on the facts (and title navigable law). Whether this means that the Bureau will conduct its own factual investigation depends on the specific river and the quality of the State's evidence.

#### Consultation and Coordination with Indian Tribal Governments and National Environmental Policy Act (NEPA) Review

You asked whether the BLM followed its General Procedural Guidance for Native American Consultation (BLM Manual Handbook H-8160-1), consulted with the U.S. Bureau of Indian Affairs. You also asked whether the disclaimer rule should have been subjected to a NEPA review.

On January 6, 2003, the Bureau published a final rule amending its disclaimer of interest regulations (68 Fed. Reg. 494; 43 CFR part 1864). The Bureau determined that the rule "does not propose significant changes to BLM and that Tribal Governments will not be unduly affected by this rule." Moreover, the Bureau determined that the proposed rule was categorically excluded from review under NEPA. See *Federal Register*, January 6, 2003, p. 502.

Please let me know if I have not addressed your concerns to your full satisfaction. Thank you for sharing your views and concerns in this matter.

Sincerely,

/s/ Mike Haskins

Michael W. Haskins,  
Chief, Branch of Lands and Realty